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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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Ex parte SAMUEL FARCHIONE

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Appeal 2009-004108
Application 09/910,520
Technology Center 3700

_____

Decided: January 25, 2010

_____

Before LINDA E. HORNER, MICHAEL W. O'NEILL, and
FRED A. SILVERBERG, *Administrative Patent Judges.*

HORNER, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Samuel Farchione (Appellant) seeks our review under 35 U.S.C.
§ 134 of the Examiner's decision rejecting claims 1-7, 11-14, 16-23, and 27-
40. Claims 8-10, 15, 24-26, and 41-43 are cancelled. We have jurisdiction
under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM.

THE INVENTION

Appellant's claimed invention is a method for determining appropriate colors of makeup and clothing for use by an individual. Spec. 1:9-10. Claim 1, reproduced below, is representative of the subject matter on appeal.

> 1.   A method for selecting fashion information for an individual comprising the steps of:
>
>   providing a style database including complimentary fashion information having cosmetic data and physical characteristic data;
>
>   providing a personal characteristic database adapted to receive physical characteristic data for an individual;
>
>   providing an input device operable to capture an image of the individual, the image comprising data of at least two physical characteristics about the individual;
>
>   capturing with the input device an image of the individual comprising data for at least two physical characteristics of the individual;
>
>   receiving in the personal characteristic database physical characteristic data for at least two physical characteristics for the individual;
>
>   comparing said physical characteristic data for the individual with the style database to identify complimentary fashion selections that are appropriate for the individual based upon the physical characteristic data received in the personal characteristic database; and
>
>   generating a hard copy of a data set that includes complimentary fashion selections that are appropriate for the individual based upon the physical characteristic data received in the personal characteristic database.

THE EVIDENCE

The Examiner relies upon the following evidence:

Nakamura	US 4,987,552	Jan. 22, 1991
Thies	US 5,206,804	Apr. 27, 1993
MacFarlane	US 5,311,293	May 10, 1994
Gourtou	US 5,478,238	Dec. 26, 1995

THE REJECTIONS

Appellant seeks review of the following rejections by the Examiner:

1. Rejection of claims 1-7, 14, 16, 17, 20, 22, 23, 27, 32-34, 37, 39, and 40 under 35 U.S.C. § 103(a) as unpatentable over Gourtou and Nakamura.

2. Rejection of claims 12, 13, 18, 19, 28-30, 35, and 36 under 35 U.S.C. § 103(a) as unpatentable over Gourtou, Nakamura, and MacFarlane.

3. Rejection of claims 11, 21, 31, and 38 under 35 U.S.C. § 103(a) as unpatentable over Gourtou, Nakamura, MacFarlane, and Thies.[1]

ISSUES

The Examiner found Gourtou discloses providing an input device (a video camera) operable to capture to an image of an individual reflective of one physical characteristic (skin tone) and capturing with that input device an image of the individual reflective of that physical characteristic. Ans. 5. The Examiner also found that Nakamura discloses that photographs may include multiple physical characteristics of an individual. Ans. 5-6. The

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[1] The heading to this rejection in the Grounds of Rejection section of the Examiner's Answer alternatively lists a rejection under 35 U.S.C. § 103(a) as unpatentable over Gourtou and Nakamura; however, the rejection does not explain a rejection based on this combination of references alone. Ans. 4. Therefore, we analyze only the rejection under 35 U.S.C. § 103(a) as unpatentable over Gourtou, Nakamura, MacFarlane, and Thies.

Examiner concluded that it would have been obvious to use the camera of Gourtou to capture an image including at least two physical characteristics, as taught by Nakamura, "to allow for the viewing/storage of an image including additional characteristics of the user." Ans. 6.

Appellant argues claims 1-7, 14, 16, 17, 20, 22, and 23 as a first group and claims 27, 32-34, 37, 39, and 40 as a second group. App. Br. 5-8. We select claim 1 as the representative claim for the first group, and claims 2-7, 14, 16, 17, 20, 22, and 23 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii) (2009). We select claim 27 as the representative claim for the second group, and claims 32-34, 37, 39, and 40 stand or fall with claim 27. *Id.*

Appellant argues that the proposed combination would require the extra step of manual data entry, and for that reason, the proposed combination would output information based on predefined definitions of physical characteristics rather than based on an individual's actual characteristics. App. Br. 7. Appellant also contends that neither Gourtou nor Nakamura discloses use of an input device operable to capture an image of the individual that includes at least two physical characteristics about the individual. App. Br. 7-8.

With regards to claim 27, Appellant reiterates the arguments made for patentability of claim 1 and further argues that the proposed combination does not disclose "receiving in the style database a requested result for the individual." App. Br. 8.

The issues before us include:

Has Appellant shown the Examiner erred in concluding that the combined teachings of Gourtou and Nakamura would have led one having ordinary skill in the art to the method of claim 1, because the proposed

4

combination would output information based on predefined definitions of physical characteristics rather than based on an individual's actual characteristics?

Has Appellant shown that the Examiner erred in concluding that the combined teachings of Gourtou and Nakamura would have led one having ordinary skill in the art to the method of claim 1, including the steps of providing an input device operable to capture an image including at least two individual physical characteristics, and capturing an image of an individual including at least two individual physical characteristics?

Has Appellant shown that the Examiner erred in concluding that the combined teachings of Gourtou and Nakamura would have led one having ordinary skill in the art to the method of claim 27, including the step of "receiving in the style database a requested result for the individual?"

The Examiner found that MacFarlane teaches use of a physical characteristic (skin tone) for selecting clothing. Ans. 4. The Examiner concluded that it would have been obvious to one of ordinary skill in the art to modify the method of Gourtou, as modified by Nakamura, to also select clothing based on physical characteristics as taught by MacFarlane. Ans. 4.

Appellant argues claims 12, 13, 18, 19, 28-30, 35, and 36 as a group. App. Br. 8-9. We select claim 12 as the representative claim, and claims 13, 18, 19, 28-30, 35, and 36 stand or fall with claim 12. 37 C.F.R. § 41.37(c)(1)(vii). Appellant also argues claims 11, 21, 31, and 38 as a group. App. Br. 8-9. We select claim 11 as the representative claim, and claims 21, 31, and 38 stand or fall with claim 11. 37 C.F.R. § 41.37(c)(1)(vii). Appellant contends that because MacFarlane teaches use of skin color as the exclusive factor in determining color compatibility for clothing selections for an individual, that MacFarlane would lead a person of

5

ordinary skill in the art in a direction divergent from the path chosen by
Appellant. App. Br. 8-9.

The issues before us include:

Has Appellant shown that the Examiner erred in concluding that the
combined teachings of Gourtou, Nakamura, and MacFarlane would have led
one of ordinary skill in the art to the subject matter of claim 12?

Has Appellant shown that the Examiner erred in concluding that the
combined teachings of Gourtou, Nakamura, MacFarlane, and Thies would
have led one of ordinary skill in the art to the subject matter of claim 11?

FINDINGS OF FACT

We find that the following enumerated facts are supported by at least
a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422,
1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for
proceedings before the Office).

1. Gourtou discloses a method and an apparatus for determining the
    foundation makeup color that substantially reproduces a person's
    natural skin color. Gourtou, col. 1, ll. 7-10. Gourtou discloses an
    alternative embodiment that also considers the hair and eye color
    of the individual in determining foundation makeup color.
    Gourtou, col. 4, ll. 45-57.

2. Gourtou discloses apparatus 10 includes means 12 for measuring
    skin color, comprising in one embodiment a video camera 14 and
    lighting means 16 for illuminating the skin of the subject.
    Gourtou, col. 6, ll. 54-59; fig. 1.

3. Appellant admits that Gourtou discloses capture and input of a
    color image of a user's arm through use of a video camera as an

input device and that such an image includes a physical characteristic of the user. App. Br. 6.

4. Nakamura discloses a method and apparatus to produce instructional makeup videos containing proper makeup methods personalized to the needs of individual users by consideration of the individual's facial characteristics, such as: shape of face, hairstyle, color of skin, eyes, eyebrows, nose, mouth, etc. Nakamura, col. 1, ll. 9-13, 47-49. Input concerning characteristics of individual users can be input via user input data generator 7 into central processing unit 6 from sources of information such as an interview, questionnaire, or photographs. Nakamura, col. 2, ll. 47-56; fig. 1.

5. Nakamura discloses the system includes a memory medium holding unit connected to a computer containing a plurality of pre-recorded memory media corresponding to categories of facial features. Nakamura, col. 1, l. 65 to col. 2, l. 2. The system selects segments of pre-recorded memory media corresponding to the input data regarding the facial features of the user, and combines the segments of pre-recorded memory media to produce an instructional personal makeup video. Nakamura, col. 2, ll. 2-15.

6. Nakamura discloses that information obtained from the user includes the wishes and demands of the user for consideration in producing the instructional video. Nakamura, col. 3, ll. 11-22.

7. Appellant's Specification does not provide a lexicographic definition of the phrase "requested result," or the terms comprising that phrase, as used in claim 27. Spec. *passim.*

8. The word "request" is commonly understood to mean "a want." *Webster's New Universal Unabridged Dictionary* (Deluxe 2d ed. 1983) ("request," noun).

9. MacFarlane discloses a method and an instrument for identifying categories of skin coloration for compatibility with colors of clothing, makeup, etc. MacFarlane, col. 1, ll. 18-20.

10. MacFarlane describes that the prior art took into account the color of the person's complexion, but incorrectly emphasized redness and "wrongly relied upon eye color, color of hair, and even racial background to assign color categories to the person." MacFarlane, col. 1, ll. 28-34.

11. MacFarlane's personal color assessment method uses skin color as the exclusive, determinative factor to arrive at personal color categorization. MacFarlane, col. 2, ll. 29-38.

PRINCIPLES OF LAW

"Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'" *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 550 U.S. at 407 ("While the sequence of these

questions might be reordered in any particular case, the [Graham] factors
continue to define the inquiry that controls.")

ANALYSIS

Claim Construction

The preface of claim 1 uses the transitional phrase "comprising" to
refer to the steps of the method, thus claim 1 is open-ended and does not
exclude additional, unrecited elements. *See Genentech, Inc. v. Chiron
Corp.*, 112 F.3d 495, 501 (Fed. Cir. 1997) ("Comprising" is a term of art
used in claim language which means that the named elements are essential,
but other elements may be added and still form a construct within the scope
of the claim.).

Claim 1 includes the steps of: (1) providing an input device operable
to capture an image including at least two individual physical characteristics,
(2) capturing an image of an individual including at least two individual
physical characteristics, and (3) receiving in the personal characteristic
database physical characteristic data for at least two individual physical
characteristics. Notably, the physical characteristics that must be received in
the personal characteristic database are not required by the claim to be the
same physical characteristics in the captured image.[2]

Claim 1 is directed to a method of selecting fashion information for an
individual based upon physical characteristics of the individual. Appellant's
Specification describes physical characteristic data as: skin color, skin tone,
hair color, eye color, body shape, shape of the face, body proportions. Spec.

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[2] The step of "receiving in the personal characteristic database" as called for
in claim 1 does not refer to an antecedent basis for the phrase "at least two
physical characteristics for the individual" since the step is not preceded by
the word "the" or "said."

2:19-21. Appellant's Specification describes that physical characteristic data may be input into the personal characteristic database by an input device such as a digital camera, or may also be input via a personal computer. Spec. 3:6-10. More specifically, Appellant's Specification describes that as an alternative to the input device 16, a sales agent may manually input individual physical characteristics into the personal characteristic database 14. Spec. 7:18-20. Neither the claim nor Appellant's Specification recites a distinction between predefined physical characteristics and actual physical characteristics. Spec. *passim*.

Giving claim 1 the broadest reasonable interpretation consistent with the Specification, the claimed "physical characteristics" received in the personal characteristics database may be either actual characteristics or predefined physical characteristics. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) (During examination of a patent application, pending claims are given "their broadest reasonable interpretation consistent with the specification" and "in light of the specification as it would be interpreted by one of ordinary skill in the art.

Because claim 1 does not prohibit additional unrecited steps, and because physical characteristics may be either actual or predetermined, a person of ordinary skill in the art would interpret claim 1 to permit manual data entry of predefined physical characteristics. Thus, Appellant's argument that the proposed combination does not meet claim 1 because it requires the extra step of manual data entry of predefined physical characteristics is not commensurate with the scope of the claim. See App. Br. 7-8.

*Rejection of claims 1-7, 14, 16, 17, 20, 22, 23, 27, 32-34, 37, 39, and 40
under 35 U.S.C. § 103(a) as unpatentable over Gourtou and Nakamura*

We are unpersuaded by Appellant's assertion that neither reference
discloses use of an input device operable to capture an image of the
individual that includes at least two physical characteristics of the individual.
See App. Br. 5-8. First, the Examiner did not find that either of the
references standing alone discloses this limitation; rather, the Examiner
found that the proposed combination of the references meets this claim
limitation. See Ans. 3-4. Appellant cannot demonstrate nonobviousness by
this individual attack on the references. *See In re Merck & Co.*, 800 F.2d
1091, 1097 (Fed. Cir. 1986); *In re Keller*, 642 F.2d 413, 426 (CCPA 1981).

Second, Appellant's argument does not demonstrate error in the
Examiner's conclusion of obviousness. The Examiner found, and we agree,
that Gourtou discloses a method of using multiple physical characteristics
(skin tone, hair color, and eye color) for use in determining foundation
makeup color for that individual, to include providing an input device (a
video camera) which captures an image of an individual reflective of at least
one physical characteristic (skin tone) (Facts 1, 2). Ans. 3-4, 5-6. By
admitting that Gourtou discloses capture and input of a color image of a
user's arm through use of a video camera as an input device and that such an
image includes a physical characteristic of the user, Appellant has largely
admitted this finding (Fact 3). The Examiner also found, and we agree, that
Nakamura teaches that photographs may provide information regarding
multiple physical characteristics of an individual for use in determining
proper makeup methods for that individual (Facts 4, 5). Ans. 3-4, 5-6. A
person of ordinary skill in the art would have recognized that application of
Nakamura's technique of obtaining multiple physical characteristics from a

photograph of a person for use in determining appropriate makeup methods for that individual to the method of Gourtou would improve Gourtou's similar method of using physical characteristic of an individual for determining appropriate makeup color for that individual. In particular, a person of ordinary skill in the art would have recognized that Gourtou's input device could also be used to capture an image of the individual to obtain physical characteristics of the individual other than only skin tone. *See KSR Int'l. Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007)("if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.").

Appellant has failed to demonstrate error in the rejection of claim 1. Claims 2-7, 14, 16, 17, 20, 22, and 23 fall with claim 1.

Claims 27, 32-34, 37, and 39-40

Independent claim 27 recites the step of "receiving in the style database a requested result for the individual." Appellant's Specification does not provide a lexicographical definition of "requested result" (Fact 7), but describes examples of requested results as "highlight eyes, full lips, highlight cheekbones." Spec. 5:15-16. "Request" is commonly understood to mean "a want" (Fact 8). In the context of the claim, the request for the result is from the individual (user). A person of ordinary skill in the art would understand this step of claim 27 to require that the style database receive a desired result from the user.

The Examiner found that Nakamura discloses "receiving in the style database a requested result for the individual," and we agree. See Ans. 6. Nakamura discloses a method and an apparatus that selects segments of pre-

recorded memory media corresponding to the input data regarding the facial features and wishes of the user, and combines the segments of pre-recorded memory media to produce an instructional personal makeup video (Facts 4-6). By receiving the "wishes" of the user, Nakamura's system receives the claimed "requested result" (desired result) of the user. Appellant provided an insufficient explanation of why Nakamura fails to meet this step, and has failed to convince us of error by the Examiner in the rejection of claim 27. Claims 32-34, 37, 39, and 40 fall with claim 27.

Rejection of claims 12, 13, 18, 19, 28-30, 35, and 36 under 35 U.S.C.
§ 103(a) as unpatentable over Gourtou, Nakamura, and MacFarlane

Claim 12 depends from claim 1 and adds the further limitation that the style database further comprises clothing information.

MacFarlane discloses a method and an instrument for identifying categories of skin coloration for compatibility with colors of clothing, makeup, etc (Fact 9). MacFarlane discloses that the prior art "wrongly relied" upon factors other than skin color, and discloses a personal color assessment method using skin color as the exclusive, determinative factor to arrive at personal color categorization (Fact 10). In other words, MacFarlane teaches that when choosing clothing color and/or makeup color, the determination should be based exclusively upon the physical characteristic of the individual's skin color.

Nakamura discloses that when selecting makeup for an individual, the determination should be based on the facial characteristics of the user (e.g., shape of face, skin tone) (Fact 4).

We are not persuaded by Appellant's teaching away argument. MacFarlane is directed to selection of colors of makeup and colors of

clothing (Fact 9). Nakamura is broader in that it is not directed solely to selection of color, but rather is directed to selection of makeup methods, which includes more than just color (e.g., where and how to apply the makeup) (Fact 4). MacFarlane's teaching that the physical characteristic of skin color should be the exclusive factor in determining clothing color or makeup color does not discourage the use of factors other than skin color to make makeup and clothing selections other than color selections. Further, the Examiner points out, and we agree, that MacFarlane teaches that a physical characteristic (i.e. skin color) may be used for selection of appropriate clothing for an individual. See Ans. 6-7. A person of ordinary skill in the art, knowing the disclosures of MacFarlane and Nakamura, would recognize that a physical characteristic, such as skin tone, can be used to make clothing selections as well as makeup selections.

We fail to see, and Appellant has failed to persuasively explain, how MacFarlane's disclosure would have led a person of ordinary skill in the art in a direction divergent from that chosen by Appellant. Thus, Appellant's teaching away argument is not persuasive of error by the Examiner in the rejection of claim 12. See App. Br. 8-9. Claims 13, 18, 19, 28-30, 35, and 36 fall with claim 12.

Rejection of claims 11, 21, 31, and 38 under 35 U.S.C. § 103(a) as unpatentable over Gourtou, Nakamura, MacFarlane, and Thies

Claim 11 depends from independent claim 1, and adds the further limitation that the style database comprises footware information.

Appellant repeats the argument that MacFarlane teaches way from the proposed combination. App. Br. 8-9. Nothing in claim 11 warrants a deviation from our conclusion regarding claim 12, *supra*, that Appellant's

argument fails to demonstrate error by the Examiner. Claims 21, 31, and 38 fall with claim 11.

CONCLUSIONS

Appellant has failed to show that the Examiner erred in concluding that the combined teachings of Gourtou and Nakamura would have led one having ordinary skill in the art to the method of claim 1, because the proposed combination would output information based on physical characteristics.

Appellant has failed to show that the Examiner erred in concluding that the combined teachings of Gourtou and Nakamura would have led one having ordinary skill in the art to the method of claim 1, including the steps of providing an input device operable to capture an image including at least two individual physical characteristics, and capturing an image of an individual including at least two individual physical characteristics.

Appellant has failed to show that the Examiner erred in concluding that the combined teachings of Gourtou and Nakamura would have led one having ordinary skill in the art to the method of claim 27, including the step of "receiving in the style database a requested result for the individual.

Appellant has failed to show that the Examiner erred in concluding that the combined teachings of Gourtou, Nakamura, and MacFarlane would have led one of ordinary skill in the art to the subject matter of claim 12.

Appellant has failed to show that the Examiner erred in concluding that the combined teachings of Gourtou, Nakamura, MacFarlane, and Thies would have led one of ordinary skill in the art to the subject matter of claim 11.

DECISION

We AFFIRM the Examiner's decision to reject claims 1-7, 11-14, 16-23, and 27-40.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

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